IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 10, 2006

MICHAEL D. LYLES v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
Nos. 2002-A-218, 2002-A-219 Monte D. Watkins, Judge

No. M2005-01857-CCA-R3-PC - Filed July 12, 2006

The petitioner, Michael D. Lyles, appeals the denial of his petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to properly prepare for trial and that his guilty pleas were unknowing and involuntary. Following our review, we affirm the post-conviction court's denial of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JERRY L. SMITH, J., joined.

James O. Martin, Nashville, Tennessee, for the appellant, Michael D. Lyles.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On February 15, 2002, the Davidson County Grand Jury returned a six-count indictment charging the petitioner with two counts of aggravated robbery, a Class B felony; one count of Class D felony evading arrest; one count of misdemeanor evading arrest; one count of resisting arrest, and one count of driving on a revoked license. That same day, the grand jury returned a second three-count indictment charging the petitioner with carjacking, a Class B felony; especially aggravated kidnapping, a Class A felony; and sexual battery, a Class E felony.

On March 3, 2003, the petitioner pled guilty to aggravated robbery, carjacking, especially aggravated kidnapping, and sexual battery in exchange for an effective sentence of thirty-four years in the Department of Correction, with twenty-two years at 100% and twelve years at 30%. Although

the transcript of the guilty plea hearing is not included in the record before this court, the assistant district attorney revealed at the post-conviction evidentiary hearing that the State's proof at trial would have been that on November 6, 2001, the petitioner carjacked an elderly woman at a K-Mart store, put his hand down her pants, took her purse and credit cards, shoved her out of the moving vehicle, and then called her hours later to tell her that he had "eight inches for her and . . . [was] coming after her, whether it took a year or a few weeks." The State's further proof would have been that the petitioner was still in the victim's vehicle when he was arrested later that same day after having used a box cutter to rob two individuals at a convenience store.

On March 2, 2004, the petitioner filed a petition for post-conviction relief alleging that trial counsel was ineffective and that his guilty pleas were unknowing and involuntary. Specifically, the petitioner alleged that counsel failed to make any attempts to negotiate a plea bargain until the morning of trial, failed to prepare any trial defense strategy or subpoena any defense witnesses, and failed to meet with the petitioner to prepare him to testify at trial. The petitioner asserted that he had little choice but to accept the plea offered by the State since it was obvious to him that trial counsel was unprepared to try his case.

At the evidentiary hearing, the petitioner testified that trial counsel brought him a plea offer from the State for fifteen years at 85%, to which he agreed, but that counsel told him to hold off on pleading guilty because he could get him a better deal. The petitioner said his second plea offer from the State occurred approximately six months later when the assistant district attorney who replaced the original one who had been assigned to prosecute his case made him an offer of thirty years at 100%, which he did not accept. He stated that the next discussion he had with trial counsel about a plea bargain did not occur until the day of trial, when the State offered him twenty-two years at 100% on one case and twelve years at 30% on the other case. The petitioner claimed that, prior to that time, trial counsel never told him the maximum penalties he faced for the offenses. He also claimed that trial counsel never had any discussions with him about trial preparation, defense strategy, or potential defense witnesses. He said that, on the day of trial, trial counsel told him that he could get sixty years on each charge if convicted at trial.

On cross-examination, the petitioner conceded that the deal he ultimately received was better than the maximum sixty-year sentence he could have received had he been convicted of all of the offenses at trial. However, he was unwilling to concede that it was better than the thirty years at 100% he had previously been offered. He acknowledged he had no alibi witnesses and knew of no proof he could have offered in his defense at trial, but countered that "that's what [he] hired [trial counsel] for." On redirect examination, he admitted that he committed the offenses and said that, were it not for counsel's advice to hold off, he would have accepted the State's initial offer of fifteen years at 85%.

The petitioner's sister, Cheryl Andrews, testified that she retained trial counsel on the petitioner's behalf. She said that during the week that preceded the trial date she telephoned counsel almost every day because she wanted to know if they needed to arrange for some witnesses to testify about the petitioner's condition at the time of the offenses. Trial counsel, however, told her that it

was not necessary and that he was "just going to . . . let [the petitioner] tell his story." Andrews stated that on the day of trial she asked trial counsel if the petitioner had any prior felonies. She said that trial counsel took the suit she had brought for the petitioner to wear and told her that he would be right back. When he returned, he appeared upset as he told her that the petitioner had more than one prior felony. She testified that she asked him why he had not known that and he replied that he should have and that he could not now put the petitioner on the stand. Andrews said that the next thing she knew, the petitioner was pleading guilty. She testified she was never privy to any plea negotiations held in the case.

Trial counsel, who had been licensed to practice law for thirty-two years, testified he had handled approximately ninety jury trials from April 1973 until July or August 1976, when he worked as a prosecutor, and an additional seventy-five to eighty trials since leaving the prosecutor's office to form his own firm. Counsel recalled that he first began discussing the possibility of a plea bargain while the petitioner's case was still at the general sessions level but that the prosecutor was not interested at the time. He said that he made the tactical decision to waive a preliminary hearing because the victim was elderly and he did not want the State to have her testimony to use against the petitioner in the event that she died before the case went to trial.

Trial counsel testified that he subpoenaed the petitioner's medical records and filed a motion requesting a psychological examination of the petitioner. He said the psychological examination revealed that the petitioner had bipolar disorder and a long history of drug addiction but was competent to stand trial and that an insanity defense was insupportable. The petitioner did not provide him with the names of any eyewitnesses and counsel was unaware of any other witnesses or testimony that would have aided the defense. Trial counsel stated that he knew that the petitioner and his family wanted him to introduce evidence of the petitioner's mental condition and drug use at trial. However, his experience was that jurors generally do not react well to information that a defendant has a history of drug abuse and was on drugs at the time of an offense. Therefore, he believed that such evidence would have hurt, rather than helped, the petitioner's case. He also believed that it would not have helped for the petitioner to testify at trial. He explained:

> And so it was never my intention to put before the jury his past, with respect to drug use. And the reason he would not have testified, in all likelihood, is, first of all, he would have to admit to the offense and in effect pled guilty; and, secondly, his record would have become known to the jury. And I think that would have had an adverse effect on their verdict as well.

Trial counsel testified that the evidence against the petitioner was very strong and included a surveillance tape from the convenience store. He said he made numerous attempts to negotiate a plea bargain, but the first prosecutor assigned to the case was unwilling to make any offer and instead wanted him to first propose an offer to the State. He, therefore, tried without success to get the petitioner to authorize his approaching the prosecutor with a fifteen-year offer. The petitioner, however, wanted probation, which counsel knew the State would never offer. Trial counsel was certain that the State never offered the petitioner fifteen years and said that, had such a generous offer

been made, he would have done everything in his power to persuade the petitioner to accept it. He described what actually transpired during his early discussions with the petitioner about the possibility of a plea bargain:

> A. And I was urging him - - what he is saying about the fifteen year offer, I really think is a misinterpretation, or mis-recollection, of what we were really talking about. My recollection is that I was trying to get him to authorize me to go to [the prosecutor] with a fifteen year offer because I felt like it was probably just going to get worse, and he didn't want to do it because he didn't want to stay in jail that long.
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> Q. So, your recollection is, there was never an offer by [the prosecutor] for fifteen years?
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> A. No. And I can tell you, again, based on experience, that if he had ever made that as a firm offer I would have done everything within my power to get [the petitioner] to take it, because I would have known that that was a very generous offer.
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> Not only did we have especially aggravated kidnapping we had two armed robbery cases in addition, which could have been run consecutive because they were obviously violent offenses. And I knew that fifteen years on the kidnapping would be virtually giving away the two armed robberies. So that would have been a very generous offer, but it was never made.

Trial counsel testified that it quickly became obvious when the second prosecutor took over the case that nothing close to fifteen years would ever be offered. He recalled that he had many plea discussions with the second prosecutor, including a conversation that took place on a downtown street corner in which he informed her that he did not believe he had the petitioner's complete record. Counsel said that when the prosecutor faxed him a complete copy of the petitioner's record he learned that he had, in fact, been missing one of the petitioner's prior convictions. He agreed that the prosecutor then offered a deal of thirty years at 100%, which was where matters stood on the date that the trial was scheduled to begin. At that time, he went back to the holding room, told the petitioner, "Let me try one more time to get this offer down," and then engaged in more plea negotiations with the prosecutor. Trial counsel testified that after receiving the victim's approval, the prosecutor made the final offer in the case.

Trial counsel testified that the petitioner's initial reaction to the new offer was mixed, in that he at first "went back and forth" on whether he wanted to go to trial or accept the offer. Counsel said that he discussed the offer with the petitioner's sister and believed that she at one point went back to discuss it with the petitioner. Soon thereafter, the petitioner decided that accepting the offer was the best thing for him to do. Trial counsel stated that the kidnapping victim, an attractive elderly woman in good health, was ready to testify against the petitioner and to "tell a horrific story about what had happened to her. . . . And I just think that we both realized that that was not going to go well." Trial counsel testified that the petitioner understood his choices and acknowledged to the trial

court in a lengthy colloquy that he was satisfied with counsel's representation, was guilty of the crimes, and had decided that pleading guilty was the best thing for him to do.

On cross-examination, trial counsel testified that the petitioner conceded to him that he had committed the crimes. He said he discussed plea negotiations with the petitioner and his family "[a]ll the way along" and, although he could not recall having specifically told the petitioner that he faced a total of sixty years, explained to him the penalties for the different offenses. He recalled that the prosecutor made the thirty-year at 100% offer "a matter of weeks" prior to trial. Finally, he conceded that the day of trial, when he approached the prosecutor with the counteroffer, is generally the worst time for a defendant to attempt to negotiate a deal.

On March 17, 2005, the post-conviction court entered an order denying the petition for post-conviction relief. Accrediting the testimony of trial counsel, the post-conviction court concluded that the petitioner failed to meet his burden of demonstrating either a deficiency in counsel's representation or resulting prejudice to his case. The court further concluded that the proof established that the petitioner entered his guilty pleas knowingly and voluntarily.

ANALYSIS

On appeal, the petitioner raises the interrelated issues of whether trial counsel provided ineffective assistance and whether his guilty pleas were rendered unknowing and involuntary as a result. The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the context of a guilty plea, the petitioner must show a reasonable probability that were it not for the deficiencies in counsel's representation, he would not have pled guilty but would instead have insisted on proceeding to trial. Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); House v. State, 44 S.W.3d 508, 516 (Tenn. 2001).

When analyzing a guilty plea, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and the state standard set out in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S. Ct. at 1711. Similarly, the Tennessee Supreme Court in Mackey required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542. A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he or she fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904.

Because the plea must represent a voluntary and intelligent choice among the alternatives available to the defendant, the trial court may look at a number of circumstantial factors in making this determination. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant's relative intelligence; (2) his familiarity with criminal proceedings; (3) whether he was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

The record fully supports the post-conviction court's findings that the petitioner failed to meet his burden of proving that he received ineffective assistance of counsel or that his guilty pleas were unknowing and involuntary. Trial counsel's testimony, which was accredited by the post-

conviction court, established that he was an experienced defense attorney who was faced with a very difficult case in terms of the strength of the evidence against the petitioner and the lack of viable defenses. Among other things, trial counsel informed the petitioner of the possible penalties for the offenses, made numerous attempts to negotiate a favorable plea bargain with the State, and met regularly with the petitioner and his family to discuss the plea negotiations. Trial counsel also subpoenaed the petitioner's medical records and requested a psychological examination, the results of which revealed that an insanity defense was insupportable. The petitioner himself acknowledged that he had committed the crimes and that he was unable to provide trial counsel with any defense witnesses.

As we have previously stated, the transcript of the guilty plea hearing is not included in the record. It is the petitioner's duty to prepare a fair, accurate, and complete record on appeal to enable meaningful appellate review, see Tenn. R. App. P. 24(b), and when necessary parts of the record are not included on appeal, we must presume that the trial court's ruling was correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Here, although the transcript of the guilty plea hearing is not before us, we do have trial counsel's testimony that the petitioner understood his choices and, in a lengthy and detailed colloquy with the trial court, admitted his guilt, expressed his satisfaction with counsel's representation, and stated that he had decided it would be best for him to accept the plea bargain offered by the State. The petitioner may have wished for a better deal, but there is nothing in the record to show that his guilty pleas were anything but knowingly, intelligently, and voluntarily entered.

CONCLUSION

We conclude that the evidence supports the post-conviction court's finding that the petitioner failed to show that he was denied the effective assistance of trial counsel or that his guilty pleas were unknowing and involuntary. Accordingly, we affirm the denial of the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE